

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:

FRANK J. HERNANDEZ
d/b/a Classic Auto Painting
& Bodyworks, Inc.

Debtor

CLASSIC COLLISION
& INSURANCE REPAIRS, INC.

Debtor

CLASSIC AUTO PAINTING
& BODYWORKS, INC.

Debtor

Chapter 11 Case

Number 93-40730

FILED

at 4 O'clock & 00 min. P. M.

Date 7-26-94

MARY C. [Signature]
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

The cases of Frank J. Hernandez, Classic Collision & Insurance Repairs, Inc., and Classic Auto Painting and Bodyworks, Inc., are before the Court for approval of the consolidated Debtor's Amended Disclosure Statement dated April 5, 1994. A single written objection to the Disclosure Statement was filed by eleven unsecured creditors, hereinafter collectively referred to as "the Objectors." The

Objectors object to the Disclosure Statement and the accompanying Plan, contending that the Plan does not treat unsecured creditors fairly because the Plan proposes the retention by the Debtor of items characterized as "luxury items" by the Objectors. The Objectors contend that if the luxury items were sold, then more funds would be available to the Plan to distribute to unsecured creditors. The Objections also contend that the Plan is not proposed in good faith.

The Consolidated Plan proposes that the individual Debtor, Frank J. Hernandez, retain a 1989 50' Chris Craft Sport Fishing Boat with a surveyed present value of between \$480,000.00 and \$528,000.00. Prior to the filing of the Chapter 11 case, the boat was reserved for the private use of Mr. Hernandez. The Disclosure Statement also reflects that the boat is encumbered by a first lien in favor of Novus Corporation which was owed \$517,503.48 as of February 15, 1994. Mr. Hernandez testified at the hearing for approval of the Disclosure Statement that he was concerned with the prospect of a substantial deficiency in the event he is forced to liquidate the boat. The consolidated Debtors contend that a substantial deficiency resulting from the liquidation of the boat would dilute the distribution to unsecured creditors under the Plan.

The Disclosure Statement states that on December 10, 1993, Mr. Hernandez formed a Florida "S" corporation known as Top Forty Charters, Inc., one hundred percent of the stock of which is held by Mr. Hernandez as debtor-in-possession. The purpose of the corporation is to provide a business vehicle for placing the boat into the commercial charter business. The Disclosure Statement reveals that the Debtor has retained a full-time captain and projects that the boat is capable of approximately two hundred charters per year. Appendix II-3 of the Plan includes a projected cash flow from charter operations with projected total revenues from placing the boat into commercial charter service of \$185,500.00 per year.

At the hearing on June 9, the Debtors introduced the testimony of George W. Herbertson, Jr., the captain of the boat and an employee of Top Forty Charters, Inc. Mr. Herbertson testified that he was an experienced, licensed charter captain and had been operating the boat in the full-time charter business since early 1994. Mr. Herbertson testified that Mr. Hernandez no longer made private use of the boat. Mr. Herbertson concurred with the Debtor's projected cash flow from charter operations but stated that his salary was \$350.00 per week, or \$18,200.00 per year - \$1,300.00 less than projected by the Debtor. He also testified that he was qualified to perform all repairs and maintenance on the boat and that such duties were included

within his salary. He testified that, whereas the Debtor had projected \$50.00 per charter for supplies and bait, the actual cost averaged \$10.00 per charter. He testified that whereas the Debtor had projected sales taxes of 6% on gross revenues, Florida no longer charges a sales tax. The Debtors stated that they intended to amend the projected cash flow from charter operations to conform with Mr. Herbertson's testimony. Those projections, as modified, show total annual expenses associated with the charter operations of approximately \$175,200 - yielding a net positive cash flow before depreciation of \$10,300.00.

The Disclosure Statement projects that the individual Debtor will receive a substantial tax benefit in the form of non-cash depreciation expenses from business use of the boat which is projected to average \$49,341.00 per year during the life of the Plan. The depreciation deduction along with the interest expense to Novus Corporation related to the boat is projected to shelter a total of \$448,703.00 in taxable income over the life of the Plan and projects tax savings of \$148,072.00 over the life of the Plan. The savings from the tax shelter is projected to free the Debtor's cash resources to facilitate payments proposed under the Plan.

The Objectors contend that the boat remains a luxury item and that

retention of a luxury item is evidence of bad faith prohibiting confirmation of the Chapter 11 plan. The Debtors note that such an objection is premature in that it goes to the confirmation of the Plan under 11 U.S.C. Section 1129(a)(3), and not to whether this Disclosure Statement contains adequate information. Nevertheless, the Debtors have requested that this Court consider the objection at this time.

The Objectors argue, by analogy, that were this a case under Chapter 13, retention of luxury items may cause of Chapter 13 debtor's plan to be unconfirmable because retention of such luxury items may result in the debtor being unable to meet the "disposable income" test imposed under 11 U.S.C. Section 1325(b). *See, e.g., 5 Collier on Bankruptcy* ¶1325.08 at 1325-49 (15th Ed. 1994); *In re Hale*, 65 B.R. 893, 896-97 (Bankr.S.D.Ga. 1986); *In re Sutliff*, 79 B.R. 151 (Bankr. N.D.N.Y. 1987); *In re Chazranowski*, 70 B.R. 447 (Bankr. D.Del. 1987); *In re Hedges*, 68 B.R. 18 (Bankr. E.D.Va. 1986); *In re Fostner*, 54 B.R. 532 (Bankr. E.D.N.C. 1985); *In re Tinneberg*, 59 B.R. 634 (Bankr. E.D.N.Y. 1986); *In re Jones*, 55 B.R. 462, 465 (Bankr. D. Minn. 1985).

In Chapter 11 cases, it has been suggested, although *in dicta* in *In re Fernandez*, 97 B.R. 262, 263 (Bankr. E.D.N.C. 1989); that:

. . . If the debtor's plan provides that the debtor will use . . . substantial income to make heavy mortgage payments on a lavish house, to pay for luxury cars, and to generally support an extravagant lifestyle, the plan may not meet the confirmation requirements of 11 U.S.C. §1129(a).

There is no "disposable income" test in Chapter 11 as there is in Chapter 12 (11 U.S.C. §1225(b)) and Chapter 13 (11 U.S.C. §1325(b)), but a plan must be proposed in good faith to be confirmable. (11 U.S.C. §1129(a)(3)). Ability to pay is certainly one factor that this court looks to when determining if a Chapter 13 plan has been proposed in good faith, and that factor would certainly be relevant in a consumer Chapter 11 case

In In re Fiesta Homes of Georgia, Inc., 125 B.R. 321 (Bankr. S.D.Ga. 1990), this Court examined the meaning of the good faith requirement for confirmation of a Chapter 11 case under 11 U.S.C. Section 1129(a)(3):

The requirement that a Chapter 11 plan be proposed in good faith necessitates a showing that there is a reasonable likelihood that the plan will achieve a result consistent with the Bankruptcy Code. The showing is not determined by what a proponent's behavior was prior to the filing of the bankruptcy petition, but rather upon the proponent's post-petition actions. [Citations omitted] The Bankruptcy Court must examine the debtor's plan and determine, in light of the particular facts and circumstances, whether the plan will fairly

achieve a result consistent with the Code. The Plan must be viewed in light of the totality of the circumstances surrounding confirmation of the plan. *Citing In re Madison Hotel Assoc.*, 749 F.2d 410 (7th Cir. 1984).

In re Fiesta Homes of Georgia, Inc., 125 B.R. 321, 325 (Bankr. S.D.Ga. 1990).

"Good faith" in the context of Section 1129(a)(3) is not defined in the Bankruptcy Code. Whether a plan meets the good faith requirement must be determined on a case-by-case basis. *See generally*, 5 Collier on Bankruptcy, ¶1129.02 (15th Ed. 1994).

Although excessive retention of luxury items may cause a Chapter 11 plan to fail to meet the good faith requirement of confirmation, I find that the boat in question here is no longer a luxury item, but has been converted to a business asset. The statements concerning the boat in Debtor's Disclosure Statement and the testimony of the Debtor and Mr. Herbertson concerning the present utilization of the boat was uncontroverted by the Objectors. Accordingly, this Court finds that the proposed retention of the boat by the reorganized Debtors is in good faith and will not cause the Plan to fail to meet the good faith requirement of Section 1129(a)(3). All

other questions of the confirmability of the Debtor's proposed Plan under Section 1129 are expressly reserved until the time of the hearing on such confirmation.

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that the Objection to the Amended Disclosure Statement and Plan of Reorganization dated April 5, 1994, is overruled.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26th day of July, 1994.